



Kaiser Saurborn & Mair, P.C.
30 Broad Street, 37th Floor
New York, New York 10004
www.ksmlaw.com

Daniel J. Kaiser
+1.212.338.9100 x317
+1.646.607.9371 fax
kaiser@ksmlaw.com

April 1, 2024

BY ECF

Honorable P. Kevin Castel
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: USA *ex rel* Stephen Sisselman v. ZocDoc, Inc.
Case No.: 22cv00861

Dear Judge Castel:

Relator, Dr. Stephen Sisselman, respectfully submits this brief response to Zocdoc's notice of supplementary authority discussing the Second Circuit's recent affirmance of Judge Abrams' decision dismissing the relator's FCA claim in *United States ex rel. Hart v. McKesson Corp.* for failure of the relator in that case to plausibly allege scienter. *See United States ex rel. Hart v. McKesson Corp.*, -- F. 4th --, 2024 WL 1056936 (2d Cir. Mar. 12, 2024).

Relator, no less than Zocdoc, relies on *McKesson* in opposing Zocdoc's dismissal motion. In affirming, in part, Judge Abrams' decision, the Second Circuit ruled that the district court correctly determined that liability under the Anti-Kickback Statute requires that "a defendant must act knowing that its conduct is, in some way, unlawful," and agreed that scienter allegations involving McKesson's offering of free Business Management Tools to providers were deficient because, *inter alia*, the relator "did not allege that McKesson took steps to conceal its behavior" or "had notice that its sales practices might be unlawful" *Id.* *11. The court pointedly noted that the relator did not allege that "McKesson took any efforts to conceal its alleged wrongdoing before the litigation began" or "*concurrently* with the violation" – *i.e.*, before facing the lawsuit's allegations – or that others at the company shared his "concerns" about offering free Business Management Tools. *Id.* at **9-10. The court expressly contrasted relator's scienter allegations, which it rejected as "peculiarly indirect," with those in other cited cases involving patient referral kickback schemes that it described as "plainly illegal." *Id.* at **7-8, 10 n.11.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be "D. Kaiser", written over a horizontal line.

Daniel J. Kaiser

DJK/sz